

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OTIS CLARK,

Defendant-Appellant.

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UNPUBLISHED

May 9, 1997

No. 202444

Kalamazoo Circuit Court

LC No. 90-001462-FC

ON SECOND REMAND

Before: Markey, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

This is the third time this appeal has been before this Court for a determination of whether defendant was deprived of his constitutional right to a jury drawn from a representative cross-section of the community. We initially found that defendant was not deprived of this constitutional right. *People v Clark*, unpublished opinion per curiam of the Michigan Court of Appeals, issued April 26, 1994 (Docket No. 142293). The Supreme Court remanded this case to us again, however, to reconsider this case with the cases of *People v Hubbard (After Remand)*, 217 Mich App 459; 552 NW2d 493 (1996), and *People v Smith*, unpublished per curiam opinion of the Michigan Court of Appeals, issued July 9, 1996 (Docket Nos. 134460, 175350). *People v Clark*, 448 Mich 884 (1995).

On reconsideration, we “reluctantly concluded” that defendant was deprived of his Sixth Amendment right to a jury drawn from a fair cross-section of the community. *People v Clark*, unpublished per curiam opinion of the Michigan Court of Appeals, issued July 9, 1996 (Docket No. 185008). In lieu of granting plaintiff’s application for leave, our Supreme Court again remanded this case to us based upon the language of the trial court in *Hubbard*, although that language was not quoted by this Court in our *Hubbard* opinion, stating as follows

The court’s finding that Defendant Hubbard and Defendant Smith were denied their Sixth Amendment right to a jury selected from a fair cross section of the community is fact specific as to each Defendant. This is to say that on the day or days that each Defendant selected his jury, the jury array did not meet the fair cross section of the community standard. The court’s decision under the Sixth Amendment standard

is not meant to apply for the entire time period of July 1990 through July 1992. This is because even though there was a flawed method of assigning jurors to the Circuit Court, it does not necessarily follow that every jury venire would violate the fair cross section of the community standard. Testimony at the evidentiary hearing established that on some occasions there were more jurors from the City of Kalamazoo in the Circuit Court venire than were present on the occasions when Defendants Hubbard and Smith selected their juries. Consequently, the decision on a Sixth Amendment claim must be decided on a case-by-case basis taking into account the venire available in Circuit Court on a given date for a specific case. [March 25, 1994 Findings of Fact and Determination on Remand from the Michigan Court of Appeals; Opinion and Order Granting Defendants' Motion for New Trial and Denying Defendant-Appellant Hubbard's Motion for Resentencing, pp 16-17; emphasis provided in the Supreme Court order.]

Supreme Court Order of Remand issued April 1, 1997. Apparently, the Supreme Court believed that the trial court's admonition in *Hubbard* should apply with equal force in the present case. Because our earlier decision on remand "does not reflect whether consideration was given to the foregoing caveat," the Supreme Court remanded the case to this Court once again so that we may "explicate its prior decision or take whatever other action it deems appropriate." We affirm.

We incorporate by reference our analysis of defendant's Sixth Amendment challenge as set forth in our most recent opinion on remand (Docket No. 185008). In that opinion, we found that the juror allocation system Kalamazoo County used before July 1992 resulted in a constitutionally significant underrepresentation of African Americans in the circuit court jury venires as a result of a systematic exclusion of significant duration, as revealed during the evidentiary hearings held and identical conclusion reached in *Hubbard, supra* at 469-472, 481-482. We now turn to the trial court record created in this case to determine whether "the venire available in circuit court on a given date for [this] specific case" escaped the inevitable and systematic exclusion of African Americans inherent in the county's skewed jury allocation system. It did not.

Defendant's first trial in April 1991 resulted in a mistrial. On May 2, 1991, during the selection of jurors on retrial, defense counsel objected to the jury venire, stating,

[t]he Court may recall at the beginning of the first trial in this matter, that we made an objection to the composition of the panel [on] racial grounds. I appears to me that there are 53 potential jurors here, I have observed one black woman as a potential juror. I would renew my objection or state a new objection for the same reasons stated in the previous trial.

Unfortunately, we do not have the record from the April 1991 trial, but defendant in his appellate brief refers us to pages 38-42 of the April 23, 1991 trial transcript where defense counsel objected to the composition of the jury array, i.e., only one African American juror out of fifty-one prospective jurors was present in the venire. In light of *Hubbard, supra*, it is unrefuted that Kalamazoo County's previous practice of allocating City of Kalamazoo jurors first to district court juries and then allocating the

remaining city residents to the circuit court jury venire significantly and systematically excluded city residents from circuit court jury venires. African-American adults comprised 14.77 percent of the City of Kalamazoo's population and 7.4 percent of the county's. Moreover, the residents of the City of Kalamazoo constituted approximately 36 percent of the county's population. *Hubbard, supra* at 471-472. Thus, given that defendant's jury was selected after defendant Smith's, *Smith, supra*, but before defendant Hubbard's, *Hubbard, supra*, and that only one African American was available to be selected out of a venire of over fifty jurors, we conclude that defendant was tried and convicted by a jury drawn from a venire that unconstitutionally underrepresented the African American community in Kalamazoo County.<sup>1</sup>

We therefore affirm our decision in Docket No. 185008 vacating defendant's convictions and sentences and remand to the circuit court for a new trial. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Donald E. Holbrook, Jr.

/s/ E.T. Fitzgerald

<sup>1</sup> In the case at bar, defendant, who is African American, is charged with sexually assaulting his Caucasian step-daughter.